1979

Edwin Gossner, Et Al. v. Utah Power & Light, A Utah Corporation and the State of Utah, By And Through Its Division of State Land : Order

Utah Supreme Court

IN THE FIRST JUDICIAL DISTRICT COURT

OF CACHE COUNTY, STATE OF UTAH

EDWIN GOSSNER, et al., Plaintiffs, v. UTAH POWER AND LIGHT, a Utah corporation, THE STATE OF UTAH, by and through its Division of State Lands, Defendants.	O R D E R Case No. 16062

The above captioned matter came on for hearing on motions this 19th day of June, 1979, plaintiffs appearing by through their attorneys, Robert C. Huntley, Jr., and Gordon J. Low, and defendant, Utah Power and Light, appearing through i attorneys, Albert J. Colton and Anthony L. Rampton, and defen State of Utah, appearing through its attorney, Michael M. Quea and the Court having considered the briefs and arguments of c enters its Order on motions as follows:

(1) The State of Utah is hereby dismissed from the action without prejudice.

(2) The Court rules as a matter of law that the on liability of the defendant, if any, will be limited to floodi resulting from the filling of the river channel with silt if caused by the erection of the Cutler Dam; and that the defend will be liable absolutely for damages occasioned thereby. In other words, the tort committed by the Utah Power and Light

Company, if any, for which it may be liable to the plaintiffs is the blocking of the channel of the Bear River by silt caused by the erection of the Cutler Dam.

The Court further rules as a matter of law that with regard to the release of waters the standard of care imposed upon the defendant is established by the Kimball and Dietrich decrees, and inasmuch as it is stipulated that such releases have never exceeded 5,500 cfs, there is no liability of the defendant either in absolute liability or in negligence because of release of water from Oneida Dam.

(3) IT IS ORDERED that the Motion for Summary Judgment by Utah Power & Light as against all plaintiffs on the ground that the statute of limitations is a bar to the plaintiffs' claim be, and hereby is, denied as made. The Court holds as a matter of law that the three year statute of limitations (which is applicable to plaintiffs' claims) began to run from the date when the channel of the Bear River was filled with silt (caused by the erection of the Cutler Dam) so as to cause flooding of the adjacent farm land of plaintiffs.

(4) IT IS FURTHER ORDERED that the Motion for Summary Judgment by Utah Power & Light Company as against all plaintiffs on the basis of rights under the Idaho Dietrich Decree and the Utah Kimball Decree be, and hereby is denied as made. IT IS FURTHER ORDERED that the plaintiffs' Motion to Strike Utah Power's First Claim for Relief (which claim asserts that Utah Power has the right to flood the plaintiffs based on the Kimball Decree) be, and hereby is granted.

(5) IT IS FURTHER ORDERED that plaintiffs' Motion to Strike the Fifth Affirmative Defense of Utah Power and Light (said defense being that the land is owned by the State of Utah rather than by the plaintiffs) be, and hereby is, granted without prejudice on behalf of the State.

(6) IT IS FURTHER ORDERED that the Motion for Summary Judgment dismissing with prejudice the complaint of the plaintiffs Ed Gossner and Josephine Gossner, on the ground that they and their predecessors have heretofore conveyed flood easements to Utah Power and Light Company be, and hereby is, granted.

(7) IT IS HEREBY ORDERED that the Motion and Stipulation of the parties to add additional parties plaintiff and additional parties counterdefendant be, and hereby is, granted.

(8) IT IS FURTHER ORDERED that the Counterclaim of Utah Power and Light for condemnation in eminent domain is dismissed without prejudice.

(9) IT IS FURTHER ORDERED that the trial date of July 1979, be, and hereby is, vacated, for the purpose of permitting party who desires to file notice of interlocutory appeal.

IT IS FURTHER ORDERED that pending any interlocutory appeal, that the parties may proceed with pretrial discovery.

DATED this 3rd day of July, 1979.

/s/
A. H. ELLETT, RETIRED JUSTICE

IN THE SUPREME COURT OF THE STATE OF UTAH

EDWIN GOSSNER and JOSEPHINE GOSSNER, husband and wife; NORA BAIR; KEN BAIR as administrator of estate of Lloyd Bair; HOWARD K. BARLOW and DEL MARIE BARLOW, husband and wife; WILLIAM BECKSTEAD and ELVIRA BECKSTEAD, husband and wife; BLANCHE BINGHAM; RALPH BINGHAM and JANE BINGHAM, husband and wife; BARDO M. BODILY and WANDA BODILY, husband and wife; ALFRED CHAMBERS and MARTHA CHAMBERS, husband and wife; RUTH FERRIS as administrator of estate of G. Ferris Chambers; LENNIS CHAMBERS; OLEY LLOYD COLEY and VERDA COLEY, husband and wife; G. ELLIS DOTY; ROBERT W. GOODWIN and ELNER GOODWIN, husband and wife; THERON HANSEN and ORIS MAY HANSEN, husband and wife, NEFF HARDMAN; HEBER HARDMAN and SHIRLEY HARDMAN, husband and wife; VAN JENSEN and DOROTHY JENSEN, husband and wife; GAIL B. JENSEN and ISABEL JENSEN, husband and wife; NEIL JENSEN and CLARA JENSEN, husband and wife; ROSS LABRUM and LINDA LABRUM, husband and wife; DUANE LABRUM; ROSS LABRUM; LEE LABRUM; ARTHUR D. MAURER and GERALDINE MAURER, husband and wife; LaMAR C. NIELSEN, administrator of estates of Clayton and Beth Neilsen; STEVE BODILY; DON E. SPACKMAN and PAULINE SPACKMAN, husband and wife; HAROLD SPACKMAN and MILLIE SPACKMAN, husband and wife; LLOYD BUTTARS and VEANA BUTTARS, husband and wife; JAMES SPACKMAN and VELDA SPACKMAN, husband and wife; BOB SPACKMAN and LINDA SPACKMAN, husband and wife; LeROY SPACKMAN and MARY C. SPACKMAN, husband and wife; REX SPACKMAN and MILDRED SPACKMAN, husband and wife; ROSS SPACKMAN, individually, and as personal representative of the estate of Hyrum Spackman; VAUGHAN B. SPACKMAN and RUTH SPACKMAN, husband and wife; C. ROBERT TOOLSON and ELOISE TOOLSON, husband and wife; CALVA J. VAN DYKE and LaRELL VAN DYKE, husband and wife; ADELBERT WHEELER and HILDA WHEELER, husband and wife; LAMONTE WHEELER and NELDA J. WHEELER, husband and wife; RAY WHEELER and FLORENCE H. WHEELER, husband and wife; REGAN WHEELER and JONETTE WHEELER, husband and wife;

CASE NO. 16592

RUBY WHEELER TRUST; WALLACE W. WISER and BEATRICE WISER, husband and wife; DAVID WOOD and CONNIE WOOD, husband and wife; MICHAEL WOOD and RUTH WOOD, husband and wife; THOMAS WOOD and CHARLENE WOOD, husband and wife; ELMER WOOD and LEOLA WOOD, husband and wife; EDITH WOOD FARNSWORTH; WALTER WOOD and NEDRA S. WOOD, husband and wife; ROYDON STROBELT; DON SPACKMAN; MERLIN ANDREWS; CHARLIE WOOD and BETTY JO WOOD, husband and wife; THEADOR J. ZILLES and LILLIE ZILLES, husband and wife; RAY ZILLES and GLENDA ZILLES, husband and wife,

Plaintiffs-Appellants,

vs.

UTAH POWER & LIGHT, a Utah corporation,

Defendant-Respondent.

REBUTTAL (REPLY) BRIEF OF PLAINTIFFS-APPELLANTS

APPEAL FROM AN ORDER OF THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY HONORABLE A. H. ELLETT, JUSTICE

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REBUTTAL (REPLY) BRIEF OF PLAINTIFFS-APPELLANTS

PURPOSE OF THIS BRIEF

This brief is to present on behalf of the appellant Cache Valley farmers their reply or rebuttal to certain facts, statements and legal arguments presented by Utah Power & Light in its answering (reply) brief.

Certain of the same issues have been briefed in the farmers' response in the companion appeal by Utah Power, Case No. 16573, which has been consolidated for oral argument with this case and, therefore, since our briefing in that case will be before the Court, we will attempt not to duplicate.

One procedural matter -- at page 3 of Utah Power's brief, the complaint is voiced that we filed the Affidavit of Dr. Milligan in opposition to various motions of Utah Power & Light on the day of the hearing before Justice Ellett. That statement is quite correct, but counsel for Utah Power neglect to mention the fact that Utah Power's motions were filed and served only one day before the hearing.

The case was set for jury trial on Tuesday, June 19, 1979, and Utah Power filed most of the motions which bring

about this interlocutory appeal and served copies of those motions on counsel the preceding day, Monday, June 18th, which motions resulted in the loss of the trial date which had been established by stipulation of counsel and Court Order more than six months before.

An earlier trial date of October 1978 was lost due to the State of Utah intervening in the case (the State ultimately being removed from the case by Justice Ellett), and an April 1979 date was lost to the farmers due to Utah Power's attorneys being involved in another Federal court case.

PART I. STATUTE OF LIMITATIONS ISSUE

With respect to this issue, Utah Power's Statement of the Facts is presented in a way which possibly leads to a misstatement of the farmers' position, and that is Utah Power's seizing on the farmers' statements in answers to interrogatories that the frequency of the flooding has rendered their land "totally useless."

It is not contended that the land is destroyed, and it is the fact, as testified to by every farmer in his deposition, that their bottom ground is some of their most fertile ground, and in those years crops are not washed away they get excellent crops from those lands.

In other words, the land is not destroyed, but it is only the fact that Utah Power has been flooding the lands more frequently in recent years than in the past, and the fact that Utah Power will not advise the farmers as to whether or not to expect flooding, results in some farmers finding it imprudent to invest money in working of the soil and purchase of seed.

In order that the farmers could make a determination for the crop years 1978 and 1979 as to whether to plant and attempt to mitigate their damages, the following interro-

tory was asked and the following answer given by Utah Power & Light for the crop year 1978 (R. 418):

> "INTERROGATORY NO. 1: The Plaintiffs specifically request the Defendant to answer the following interrogatory in order to assist in attempting to mitigate damages for the crop year 1978:
>
> > "'Please state whether the plaintiffs should anticipate that their lands will be flooded during the spring, summer and fall of 1978 due to discharge of water from the Oneida Dam or the backing up of water from the Cutler Reservoir. (This interrogatory is intended to exclude quantities of water caused by any natural state of the river prior to the installation of the Oneida and Cutler Dam.)'"
>
> "ANSWER TO INTERROGATORY #1: Defendant objects to the form of Interrogatory #1 in that it assumes facts not in evidence, is argumentative in nature and asks for defendant to speculate as to events beyond its control.
>
> > (a) Defendant does not know what plaintiffs should anticipate;
> >
> > (b) Defendant does not know what plaintiffs mean by 'flood.'
> >
> > (c) Defendant denies any flooding has occurred 'due to discharge of water from the Oneida Dam or the backing up of water from the Cutler Reservoir.'"

For the crop year 1979 the same interrogatory was served, and Utah Power again refused to respond with a definitive answer and simply filed an objection reading as follows (R. 505):

> "Defendant Utah Power and Light objects to the undated interrogatory served upon it by mail on April 24, 1979 because it assumes a fact not established by the evidence, which this defendant denies, to-wit: that mere discharge of water from the Oneida Dam or backing up of water from the Cutler Reservoir is the cause of any flooding to property claimed by plaintiffs."

Since Utah Power would give no assurances that it would cease the discharging of water from the Oneida Dam in greater

amounts than the river channel would carry, many of the farmers felt it would be irresponsible to attempt to plant their lands during those two summers. The fact is that Utah Power did control most of the flooding as to most of the farms in those two years, thus proving that the flooding is not a permanent, necessary adjunct to the operation of the system but that, rather, the flooding is in the category of a "continuous or abatable nature" in the context of the HAYES case, as opposed to being a permanent injury. The HAYES case is quoted at pages 12 and 13 of our Opening Brief.

At page 6 of the Utah Power & Light brief, O'NEIL v. SAN PEDRO, L.A. & S.L.R.CO., 38 Utah 475, 114 P. 12 (1911), is cited for the proposition that the Utah Power dams, like the San Pedro Railroad, are permanent structures and a continuing enterprise and, therefore, the injuries are permanent, causing the statute of limitations to commence when the railroad [dam] is built.

The SAN PEDRO case is clearly distinguishable from the instant case for the following reasons:

(a) The Court, in SAN PEDRO, properly found that the continued operation of the railroad would always result in vibrating the nearby house even when the railroad was operated in a proper and usual manner.

(b) In the instant case, there is no necessity of operating the Bear River at such discharges of water from Oneida that the capacity of the natural channel is exceeded.

(c) Certainly, even in the SAN PEDRO case, the Court would not have gone so far as to hold that the railroad could, at its convenience and without payment or compensation for the land, run its tracks

and its trains through the front yard of the plaintiff's home -- likewise, it is ridiculous in the instant case for Utah Power to assert that it can run its water at will outside the natural channel and over and across the farmers' lands without either condemning the lands or purchasing the lands.

Utah Power next cites JOHNSON v. UTAH-IDAHO CENT. RY. CO., 68 Utah 309, 249 P. 1036 (1926), at page 7 of its brief, for the same purpose as the SAN PEDRO RAILROAD case. The UTAH-IDAHO CENTRAL RAILROAD case is distinguishable for precisely the same reasons as discussed above relative to the SAN PEDRO RAILROAD case.

Utah Power quotes at page 8 of its brief that portion of HAYES v. ST. LOUIS & S.F.R. CO., 117 Mo. App. 201, 162 S.W. 266 (1913), which holds that where the structure is permanent and causes a permanent flooding, the action is singular and the statute of limitations bars it where the injuries are permanent.

Utah Power, in quoting to this Court that portion of the HAYES case, followed exactly the same tactic it did before Justice Ellett by omitting to apprise either this Court or Justice Ellett of the following wording contained on the same page (p. 268) of the Southwestern Reporter:

> ". . . but where the nuisance is of a continuing (abatable) nature, each continuance gives rise to a new cause of action, and successive actions may be maintained for the damages accruing from time to time.
>
> ". . . Nuisance consisting of acts done, or particular uses of property, may be properly termed 'continuing' when they are such a character that they may continue indefinitely, or, on the other hand, may be discontinued at any time." (Emphasis supplied)

The fact that Utah Power was able to stop the flooding during the last three years is, at least, prima facie

evidence that the injury is abatable and subject to discontinuation rather than permanent.

The Court, in HAYES, quotes with approval from CARSON v. CITY OF SPRINGFIELD, 53 Mo. App. 289, the following language:

> ". . . When the nuisance or cause of the injury may be removed or remedied at any time, the measure of damages is the actual damage sustained up to the date of the institution of the suit. Damages accruing subsequently must be recovered in successive actions."

That, of course, is the situation here. The historical abatement illustrates this.

The record clearly establishes that Utah Power was granted license through the Dietrich and Kimball Decrees to discharge water through the natural channel of the Bear River. The record also shows that Utah Power has within its power the ability to control the discharges at Oneida to keep its water within the natural channel.

Drawing a further parallel from the HAYES case, in HAYES the defendant railroad was given license to build a railroad embankment which did begin backing up water to a certain level, and the Court properly held that that embankment was not, in and of itself, a nuisance.

In the instant case, Utah Power & Light was given authorization for three actions in question in this case:

(1) to build Cutler Reservoir;

(2) to build Oneida Dam and Reservoir; and

(3) to run water between the two of them through the natural channel.

Thus, any running of water outside the natural channel is beyond the scope of its license and, therefore, is an abatable nuisance, and any running of waters outside the natural channel is a proper basis for damage compensation whenever it occurs.

Utah Power next, at page 9, quotes KONECNY v. UNITED STATES OF AMERICA, 388 F. 2d 59 (8th Cir. 1967), in support of its position that the statute of limitations would run at the time Utah Power's dams were built. Again, KONECNY is distinguishable in that it involved flooding to the plaintiff's lands which were inundated by a reservoir when the reservoir reached its designed lake level, the court holding that that lake level was a part of the permanent design of the system.

In the instant case, the permanent design of the system neither authorizes nor requires that more water be run through the Cache Valley than the natural channel will hold.

The DICKINSON case cited at page 9 of Utah Power & Light's brief is distinguishable on the same basis. DICKSINSON is further distinguishable in that, in DICKINSON, the fertility of the lands was destroyed the year after the dam was built, but in the instant case the lands still have their fertility and value for raising crops whenever Utah Power abides by the limit of its license by keeping its waters in the natural channel.

At pages 9, 10 and 11, Utah Power quotes from the Georgia case of SMITH v. DALLAS UTILITY CO., 107 S.E. 381 (Ga. 1921), which, again, is clearly distinguishable from the instant situation. The recitation of facts in DALLAS UTILITY COMPANY states:

> "The dam was built of concrete and was 30 or 40 feet high, there was no way to prevent the bank in question from being overflowed except by destroying the dam. The dam was properly constructed and maintained."

Such is quite different than the instant case, where the causative factor is not the height of the Cutler Dam, or even the presence of the upstream Oneida Dam, the factor causing the flooding simply being the discharge of more

water than the natural channel of the Bear River can carry, which factor is abatable and controllable by Utah Power & Light.

The DALLAS UTILITY COMPANY case goes on to state what would be the rule of law under the facts of the instant case:

> "While it is true that every continuance of a nuisance not permanent and which can and should be abated, is a fresh nuisance for which a new action will lie (citation omitted), the facts of the instant case fail to bring it under that well settled rule of law."

The court then noted that the reason the Georgia case did not come within the latter rule of law was that the height of the dam was authorized and, therefore, not a nuisance, and the flooding was not abatable with the water at that level.

In the instant case, exceeding the banks of the natural channel is not authorized and, therefore, is a nuisance, and exceeding that channel is abatable simply by using care and discretion in the release of waters at Oneida, and, thus, the statute of limitations commences to run with each new flooding and the case should be remanded to be tried under that principle of law.

Utah Power & Light takes an interesting position at pages 11 and 12 of its brief:

> " . . . it is clear that Justice Ellett's in limine ruling in this regard is correct - i.e., the statute of limitations began to run from the time the erection of the Cutler dam initially caused the flooding.
>
> "Appellants obviously deny there is any causation at all between Cutler Dam and the flooding of appellants' lands, and, of course, are only conceding this arguendo for purposes of the statute of limitations. If no causation is proved there would be no liability in any event."

Utah Power, in Section B of its Argument on the statute of limitations question, at pages 12 through 15, misstates the record when it states that the two dams have been in operation for more than 50 years, and that:

> "The facts are undisputed that the manner and method of their operation has been unaltered since their inception, both as to the amount of water released from the upper dam [Oneida] and as to the water level of the reservoir behind the lower dam [Cutler]." (Emphasis supplied)

The fact is that the method of operation of Oneida has changed, and that fact is set out in the Affidavit of Dr. Milligan attached to our Opening Brief as Appendix "B".

Dr. Milligan specifically stated that his studies of the discharges from Oneida discloses that the difference between the flooding and nonflooding years is explained by the relatively longer periods of time of high level discharges during the flood years.

(In other words, Dr. Milligan conducted "time-duration curve" studies based on Utah Power & Light's own discharge reports.)

Dr. Milligan's testimony is that there has been a change in operation and, thus, Utah Power's assertion that the operation has been unaltered since the inception of the dams at page 13 is untrue.

PART II. THE ERROR IN THE TRIAL COURT'S INTERPRETATION OF THE EFFECT OF THE KIMBALL AND DIETRICH DECREES

The farmers have certified as an issue on this appeal the fact that Justice Ellett's Order is in error when he holds that the Kimball and Dietrich Decrees permit the discharge of 5,500 cfs of water through the Cache Valley in Utah.

We have quoted the Kimball and Dietrich Decrees extensively in both our Opening Brief in this action and at pages 4 through 8 of our Answering Brief in the companion appeal, Civil #16573.

Additionally, the pertinent portions of both the Kimball and Dietrich Decrees have been appended to both Briefs.

We have specifically presented to the Court those portions of the Decrees which state that the 5,500 cfs figure is an authorization to collect that amount of flood waters at Bear Lake, and have further specifically quoted all of the portions of both Decrees which provide that the license to discharge is only through the natural channel.

Utah Power treats this issue at pages 19 through 22 of its brief, and nowhere does it ever point out any errors in the citations to the actual Decrees we have provided, and nowhere does it quote any portion of the Decrees that ever states authority for Utah Power to discharge 5,500 cfs through the Cache Valley.

The position taken by Utah Power that it can discharge 5,500 cfs even though that volume overflows the natural channel through Cache Valley to the extent of 2,100 cfs (Affidavit of Dr. Milligan, page 2), certainly appears to be somewhat absurd.

Perhaps the position of the parties in this case can be best illustrated by taking an extreme example:

> Suppose, instead of the Bear River channel being only partially filled with silt, it became 100% full of silt so that there was nowhere for the water to run where the natural channel had been --
>
> -- would anyone suppose that under that circumstance Utah Power & Light would be able to move over to another area in the Cache Valley and run its water down through not only the plaintiff farmers' lands,

but also through the properties of the people in the City of Logan, to get its water from Oneida to Cutler, simply because the Kimball and Dietrich Decrees gave it the right to discharge waters from Bear Lake for electricity generating purposes at all times of the year?

We submit that Judge Kimball and Judge Dietrich spoke advisedly and with precision when they authorized the discharge only through the natural channel, because they fully recognized that they were not hearing a suit for eminent domain to condemn any new river channels, but were simply involved in a suit for the adjudication of water rights.

We request that the remand contain directions to the Trial Court to amend its Order to provide that the maximum discharge allowable through the Cache Valley area is that which can be contained by the natural channel rather than the figure of 5,500 cfs.

PART III. THE ERROR IN DENYING RIGHT TO INTRODUCE EVIDENCE AS TO NEGLIGENT DISCHARGE OF WATERS FROM ONEIDA DAM

This issue is really covered by the briefing relative to Issues I and II.

Simply stated, plaintiffs' engineering investigation establishes that one of the major causes of the flooding is the negligent manner in which Utah Power discharges water from Oneida Dam at widely fluctuating volumes and with volumes at such time durations as to make it inevitable that the banks of the natural channel through the Cache Valley would be breached.

This issue is plead, the fluctuations are testified to in the depositions of at least 15 of the plaintiff farmers, and Dr. Milligan's Affidavit sets forth the result of his computer studies of the actual discharge data.

Strangely enough, in face of that testimony in the record as to the negligent operation of Oneida, the Trial Court has ruled (prior to hearing any evidence) that he will not hear any evidence as to the negligent operation of Oneida. We know of no legal precedent for the court's stating it will not take evidence on a negligence issue when that negligence has been properly plead and is being offered through competent, admissible testimony.

Clearly, the Order of the Trial Court should be reversed in this regard and the Court should be ordered to permit introduction of competent testimony on that very proper issue.

PART IV. THE IMPROPER DISMISSAL ON SUMMARY JUDGMENT OF THE COMPLAINT OF THE PLAINTIFFS EDWIN AND JOSEPHINE GOSSNER

The Utah Power brief, in Part III on the issue of summary judgment of dismissal granted against Edwin and Josephine Gossner, raises no legal issue by way of the citations therein set forth other than Utah Power's incorrect assertion at both pages 26 and 27 that we are dealing with a situation where there has been no change or fluctuation in the manner of the operation.

There has been both an increase in the volume of water discharged and an increase in the frequency of discharge onto the Gossner farm. Both the matter of the increase of the burden of the flood easement and the negligent abuse of the flood easement (by the lack of care in the time duration level of discharges from Oneida) are jury questions, and the Trial Court's attempt to dispose of those factual, disputed issues on summary judgment violates both the spirit and intent of Rule 56.

CONCLUSION

It is respectfully submitted that the Order of the Trial Court as to the issues presented on this appeal be reversed, and that the remand provide:

(1) That the statute of limitations as to damage to crops commences at the time of each successive injury to the crops;

(2) That plaintiffs be permitted to present testimony as to the causative effect of the operation of the Oneida Dam (and the discharges therefrom) on the flooding which they have experienced.

(3) That the Court be directed that the Kimball and Dietrich Decrees permit discharges in the Cache Valley section of the Bear River by Utah Power up to and not exceeding the capacity of the natural channel, and not up to the limit of 5,500 cfs, as erroneously determined by the Trial Court.

(4) That the dismissal of the claims of Edwin and Josephine Gossner on summary judgment be reversed, with directions to the Court to present the factual questions of:

(a) increase of the burden of the flood easement; and

(b) negligent abuse of the flood easement;

to the jury.

Respectfully submitted,
RACINE, HUNTLEY & OLSON

By_____
Robert C. Huntley, Jr.

HILLYARD, GUNNELL & LOW

By_____
Gordon J. Low

I HEREBY CERTIFY that two copies of the foregoing Brief were mailed to Albert J. Colton, 800 Continental Bank Buildin 231 E. 4th South, Salt Lake City, Utah, 84111, this 5th day of December, 1979, in an envelope with sufficient postage prepaid thereon.

Robert C. Huntley, Jr.

". . . It is further ordered that the Motion for Summary Judgment dismissing with prejudice the complaint of the plaintiffs Edwin Gossner and Josephine Gossner, on the ground that they and their predecessors have heretofore conveyed flood easements to Utah Power and Light be and hereby is granted."

The issue whether or not an easement has been negligently abused or whether the burden on the easement has been wrongfully increased is a jury question.

Utah Power has filed as a "Third Claim for Relief" commencing at page 4 of its Amended Answer and Counterclaim, a defense as to the plaintiff, Ed Gossner, that the power company holds a flood easement on his land and that, therefore, his claim is not proper and that, additionally, he is liable for attorney's fees and court costs for participating in this action.

The fact is that the Gossner Flood Easement was executed on the then existing type of operation of the river in 1953, and that operation has changed materially in recent years so that it is flooding more of Mr. Gossner's land at different and more inconvenient times than existed at the time the easement was taken. (Deposition of Edwin Gossner at pp. 48, 50, 62 and 74) The law is, as established by a Ninth Circuit Court case involving Utah Power & Light, that such a flood easement is not a defense.

In GRIFFITH v. UTAH POWER & LIGHT CO. (1955), 226 F.2d 661, the Ninth Circuit Court held that even where the power company has a perpetual easement, still it may be held liable for damages caused by its wrongful or negligent flooding of the plaintiff.

In GRIFFITH, the Ninth Circuit Court overruled a dismissal granted by the District Judge on summary judgment, premised on the existence of the easements, the Court stating at page 668:

"Even if defendant had an absolute right, under the principle that one must not use even vested property in such a manner wrongfully or negligently to injure

contends that this charge was erroneous and that it should be exempt from liability for flood damage to land on which it held flood easements. We find this instruction to be consistent with the holding of this Court in Griffeth v. Utah Power & Light Co., 226 F.2d 661, 668-69 (9th Cir. 1955), which held the same defendant potentially liable for negligence in causing flood damage despite the existence of a flood easement."

The deposition of Ed Gossner in this case establishes that at the time he gave the flood easement, the Utah Power & Light representatives advised him that there would be no more flooding to be expected on his lands than he had been experiencing in previous years. (Gossner Depo. at 38, 82)

The representative further told him that he could continue to use his lands for farming purposes as he had in the past. (Gossner Depo. at 73 and 83)

Mr. Gossner's deposition further establishes that up until about 1960 he was making excellent use of his bottomlands, in fact, getting two crops a year off of them by planting rye in the fall which would be harvested in the spring for silage, and then planting on the same ground a corn crop which would be harvested later in the fall for silage -- in fact, it was his most valuable ground. (Gossner Depo. at 34-35)

His deposition further establishes that commencing about 1960 the power company began to flood his lands to a greater and greater extent where, until finally in the 1970's, he was unable to rely on planting any of it. (Gossner Depo. at 44, 57, 67)

It is a jury question (and certainly not a matter of law to be determined before the evidence is in) as to whether the increased flooding on Gossner's land is due to negligence of Utah Power.

It is further a jury question as to whether Utah Power has increased the burden of the flooding beyond that which was contemplated by the parties when the easement was granted. The deposition of Mr. Gossner sets up those disputed facts (Gossner Depo. at 36-38; 70, 72 and 92), and Mr. Gossner is entitled to have that question determined by the jury, with the granting of summary judgment being (continued on p. 21)